United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 20, 2004

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Teamsters Local 36
(Hanson Aggregates Pacific Southwest, Inc.) 536-2576-5000
Case 21-CB-13683

This case was submitted for advice as to whether the Union violated Section 8(b)(1)(A) by maintaining a contractual provision that stewards in a unit of ready-mix concrete truck drivers be dispatched first each day. We conclude that the charge should be dismissed, absent withdrawal, since under Dairylea[1] principles, there was a lawful justification for the clause to allow for a steward to be present each work day for collective-bargaining and representational purposes.

Briefly, the Union has represented a unit comprised primarily of ready-mix concrete truck drivers for years, working at several concrete batch plants for the current Employer and its predecessors. Each driver calls a recording each evening to find out when he is to be at a batch plant the following day, with his truck to receive a load of concrete; the drivers are scheduled to report in 5 to 10 minute increments. The parties' expired collective-bargaining agreement provides that from Monday through Thursday, "drivers will be dispatched on a straight seniority basis." From some point in the past until 1985, and again since 1994, the collective bargaining agreements for the drivers have contained a clause providing that the steward would be the first to start work each day. Since 1994, the clause has stated that "persons selected as stewards will be dispatched first each work day", except when doing so would incur overtime. Although there is currently no contract in effect, the parties have continued to abide by that term.

The Union contends that the clause was reinstated during the 1994 contract negotiations with the Employer's

[1] Dairylea Cooperative, Inc., 219 NLRB 656, 658 (1975), enfd. sub nom. NLRB v. Teamsters Local 338, 531 F.2d 1162 (2d Cir. 1976).

predecessor at the request of employees, who wanted a steward available first thing in the mornings to assist employees in representational matters. The parties agreed that it was in their best interest to have the stewards as available as possible. The Union states that in 1994 the amount of work in the ready-mix industry was not good, but that most stewards were senior employees who were working fairly steadily.

The Employer asserts that for approximately the last 6 years, there has been no concern about employees not being dispatched everyday (and, therefore, for the steward to be available everyday), since there has been enough work to keep unit employees fully employed. The Union agrees, but states that when there is bad weather or when a customer cancels at the last minute, some employees do not work – and those are the days when a steward is needed because the lack of work usually raises complaints. The Employer asserts that the "first dispatch" clause is not necessary, as illustrated by the fact that two stewards choose not to be dispatched first, but rather in their normal seniority order. The Employer also points to a contract clause stating that in a reduction in force, the steward shall be the last to be laid off. There is no evidence that being dispatched first results in any financial benefit for stewards; in fact, it may result in lesser opportunities for overtime, since drivers who are dispatched later in the day may receive a larger share of unforeseen overtime at the end of the day. The Union also points out that a steward cannot count on being dispatched at a set time each day, since the Employer may schedule the first dispatch to be at 3:00 AM one day and 6:00 AM the next day; the steward, like any other driver, will not know the next day's dispatch time until the evening before.

We conclude that the charge should be dismissed, absent withdrawal. In Dairylea,[2] the Board held that contract provisions granting stewards superseniority for "all purposes," and not simply lay-off and recall were presumptively (not per se) unlawful. To overcome that presumption, a union and/or employer must show that superseniority is justified for legitimate business reasons[3], i.e. legitimate "collective bargaining policies under the Act."[4] Subsequent to and consistent with its

[2] Dairylea, 219 NLRB at 658.

[3] Id.

[4] Electrical Workers IBEW Local 1212 (WPIX), 288 NLRB 374, 376 (1988), rev. denied 870 F.2d 858 (2d Cir. 1989). See also, Carpenters Local 49 (Scott & Duncan), 239 NLRB 1370,

decision in Dairylea, the Board articulated a three-part test for analyzing contract provisions that award special benefits (other than superseniority) to stewards or union officers: 1) Does the provision treat employees differently on the basis of their union status or activity? 2) Does the distinction tend to encourage the union status or activity in question? 3) Is the disparate treatment at issue justified by policies of the Act?[5] If the answer to either of the first two questions is no, or the answer to the third question is yes, there is no violation and the case should be dismissed.[6]

Applying the Board's three-part test to the facts here, we conclude that the Union did not violate the Act by maintaining the "first dispatch" clause for stewards. Under the first factor of this analysis, the clause clearly does treat employees differently based on Union activity. Under the second factor, in times of limited work opportunities such as in 1994 when the provision was restored, the "first dispatch" would tend to encourage employees to become stewards in order to be assured of work each day; however, in the current situation when there is not a lack of work, the "first dispatch" may not encourage employees to become stewards. In that regard, we do not necessarily see the ability to be dispatched first each day as a benefit for scheduling purposes which would encourage Union activity, since the time of the first dispatch, as for any other dispatch, may vary widely from day to day.

Thus, we must determine whether the disparate treatment is justified by policies of the Act under the third factor of this analysis. The Union asserts that the clause can be compared to lawful superseniority for layoff and recall on a daily basis, since being dispatched first ensures the availability each day of a steward. Under Dairylea, the Board has found lawful provisions protecting stewards from

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1371 (1979) (union had legitimate statutory purpose for referring employee most qualified to perform as steward; any discrimination was "incidental side effect of a more general benefit" accorded all employees). Cf. Auto Workers Local 561 (Scovill, Inc.), 266 NLRB 952, 953 (1983) (union's grant of superseniority to union officers not involved in contract administration unlawful).

[5] Id. at 376; Manitowac Engineering Co., 291 NLRB 915, 919 (1988), enfd. 909 F.2d 963 (7th Cir. 1990), cert. denied *sub nom.* Clipper City Lodge No. 516 v. NLRB, 498 U.S. 1083 (1991); Consumers Energy Co., 325 NLRB 963, 965 (1998).

[6] WPIX, 288 NLRB at 376; Consumers Energy, 325 NLRB at 965.

bumping[7] and conferring superseniority on stewards for purposes of overtime.[8] In each case, the provisions were designed to meet the legitimate goal of having a qualified steward available.

Here, the clause ensures the presence of a steward each day by requiring the Employer to schedule the steward for the first dispatch. While that legitimate goal may not require the use of the "first dispatch" clause most days during periods of full employment, the clause guarantees such a legitimate result, either on an occasional basis during these periods of otherwise full employment when fewer drivers are needed on a given day, or on a wider basis if the industry were to experience another period of slow work with limited daily dispatches. During periods when work is freely available, it is not obvious, as discussed above, that the ability to have the first dispatch (which varies from day to day) would necessarily tend to encourage Union activity. In all these circumstances, we cannot conclude that the clause is unlawful. Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.

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[7] Goodyear Tire & Rubber Co., 322 NLRB 1007, 1008 (1997) (parties' superseniority clause protecting stewards from bumping lawful under Dairylea; "superseniority was used to enhance the union's ability to represent employees" during critical time).

[8] Auto Workers Local 1331 (Chrysler Corp.), 228 NLRB 1446, 1447 (1977) (union's object of having both steward and committeeman on the job when employees were working justified superseniority for overtime); Union Carbide Corp., 228 NLRB 1152, 1154 (1977) (union's efforts to have the same steward on the job is a legitimate justification for superseniority).